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**PRESERVING FABLED AMATEURISM: THE BENEFITS  
OF THE NCAA'S ADOPTION OF THE OLYMPIC  
AMATEURISM MODEL**

*John Kealey\**

I'm not only saying that it is a right for a [collegiate athlete] to play summer ball for money . . . but I'm going further than that. . . . [They are] failing in [their] duty to [them]self and to the world if [they do] not take advantage of it and use it to the best of [their] ability.

– G. Stanley Hall, *President, Clark University*<sup>1</sup>

*After a century of denying student-athletes from receiving compensation outside the cost of attendance for their athletic contributions to their respective universities, the NCAA finally announced it would change its amateurism rule. The change came in response to multiple class action lawsuits and, more recently, legislation from many states, namely California and New York, which would have mandated that universities do not interfere with student-athletes desire to commercially exploit their own names, image, and likenesses. However, these statutes are potentially flawed in that each could exacerbate or perpetuate the anti-trust and first amendment issues inherent to the current amateurism rule. Further, the NCAA's proposed change to its amateurism rule*

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\* Brooklyn Law School (J.D. Candidate 2021); University of Colorado Boulder (B.A. 2017). Thank you to all the hard-working collegiate and professional athletes who continue to provide entertainment, a critical platform for civil rights reform and special family memories. Special thanks to the Journal of Law and Policy for their detailed work and support; but most importantly, my late father, James Kealey, for teaching me about the joys of sports and the nuances of editing a composed paper.

<sup>1</sup> RONALD A. SMITH, PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM 56–57 (Benjamin G. Rader & Randy Roberts eds., 2011).

*includes language limiting the student-athlete's right to self-monetization in a way that is more restrictive than the proposed legislation. To shift away from the amateurism model, scholars have suggested that the NCAA use the Olympic model as a guide. These suggestions were salient in the aftermath of the O'Bannon and Keller decisions and continue to be in light of the current proposed legislation. This note examines new efforts being made to regulate amateurism in sports and finds them wanting. It then turns to a discussion calling for the NCAA to adopt the Olympic model of amateurism to ensure student athletes finally get a piece of the NCAA's century long windfall.*

## INTRODUCTION

Beginning as a non-unified group of universities competing in sports solely for pride,<sup>2</sup> NCAA collegiate athletics has grown to a billion-dollar enterprise tasked with unifying its student-athletes and their respective universities in sharing their newfound wealth.<sup>3</sup> Presidents of a select few colleges, “lacking status, unity, or real power to lead intercollegiate reform,”<sup>4</sup> founded the National Collegiate Athletic Association (“NCAA”) on two core principles: (1) all participating athletes must be students, and (2) all participating athletes must be amateurs.<sup>5</sup> The new organization defined an amateur as “one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.”<sup>6</sup>

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<sup>2</sup> *Id.* at 2.

<sup>3</sup> Arash Afshar, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athlete's Right of Publicity*, 51 WILLAMETTE L. REV. 101, 104 (2014).

<sup>4</sup> SMITH, *supra* note 1, at 52.

<sup>5</sup> Testimony of Defendants' Witness, Mark Emmert at 1728–29, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2015) (No. C-09-3329).

<sup>6</sup> Afshar, *supra* note 3, at 109.

Student athletes know the NCAA is a billion-dollar enterprise built on their talents,<sup>7</sup> creating a frustration that is exacerbated by colleges' distribution of the revenues. As of 2017, the NCAA cleared an annual revenue of over one billion dollars.<sup>8</sup> In 2018, the Department of Education reported \$14 billion in total college sports revenue.<sup>9</sup> Star college athletes bring in significant revenue for their respective schools, with recent estimates concluding a "top level college football player generates \$538,760 per year[,] or over \$2 million over a four year period."<sup>10</sup> The majority of college sports revenue is closely held amongst the Power Five conferences,<sup>11</sup> which represent just 3% of schools competing in the NCAA, yet bring in 54% of college athletics revenue, mostly through massive football programs.<sup>12</sup> Unsurprisingly, the majority of NCAA schools' athletic departments are not self-sustaining;<sup>13</sup> "as few as twelve athletic departments make a profit."<sup>14</sup> In order to build varied and competitive athletic programs, universities allocate income from

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<sup>7</sup> Steve Berkowitz, *NCAA Reports Revenues of More than \$1 Billion in 2017*, USA TODAY (Mar. 7, 2018), <https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002>.

<sup>8</sup> *Id.*

<sup>9</sup> SEN. CHRIS MURPHY, MADNESS INC. HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS—EXCEPT THE PLAYERS 3 (2019), [https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report\\_FINAL.pdf](https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf).

<sup>10</sup> The analysis further discusses studies which show that the net gain for a university—after deducting the value of a college athlete's scholarship—sits around \$20,000, and that the average incremental profit from what the study defined as a "good player" was about \$150,000 per annum. However, the article recognizes it is "difficult for any study to peg a specific dollar amount of revenue to a specific student athlete." Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, 14 ANTITRUST 46, 47 (2000).

<sup>11</sup> The Power Five conferences include the Atlantic Coast Conference, Southeastern Conference, Big Ten, Big 12, and Pac-12. MURPHY, *supra* note 9, at 5.

<sup>12</sup> *Id.*

<sup>13</sup> Afshar, *supra* note 3, at 106; see Michael T. Jones, *Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After O'Bannon v. NCAA*, 56 B.C. L. REV. E. SUPP. 79, 90 (2015) ("[O]ther courts should follow the example of *O'Bannon's* analysis of the legal merits and economic implications of the NCAA's amateurism polices, and continue to trend away from blind deference to the NCAA.").

<sup>14</sup> MURPHY, *supra* note 9, at 12.

popular sports—primarily college football—to team facilities construction, coaching staff and other less profitable athletic programs.<sup>15</sup> However, in the Power Five conference, the imbalance between money allocated to scholarships as opposed to coaches' salaries and "athletic palaces" is significant.<sup>16</sup> "Between 2004 and 2014, Power Five conferences nearly doubled facilities spending," which student-athlete advocates characterize as "[s]hrine-building aimed at seducing teenagers" into generating more revenue for their schools.<sup>17</sup> Further, Power Five conferences allocated 16% of revenue to coaches' salaries in contrast with 12% to athletic scholarships for the student-athletes whose labor generates the revenue.<sup>18</sup>

Student-athletes and critics of the NCAA's amateurism standard also point to the conspicuous irony that, under amateurism, famous head coaches, such as Duke University's Mike Krzyzewski<sup>19</sup> and Ohio State University's Urban Meyer, are paid seven figures indirectly by apparel companies as a part of their school contracts.<sup>20</sup> The top 100 Division I NCAA football coaches also command impressive salaries, ranging from \$360,000 to over \$9 million.<sup>21</sup> Past head coaches have even negotiated apparel contracts, including one case where 98% of the contract was paid directly to the head coach of the program.<sup>22</sup> Yet, universities refuse to allow student-athletes the same freedom to accept endorsement money.

Although some might argue that a student athlete's scholarships and financial aid are themselves benefits, others opine that

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<sup>15</sup> *Id.* at 4–7, 10.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> Shropshire, *supra* note 10, at 47 (explaining that in 1993 Nike sought to lure Duke basketball players away from Adidas by paying coach Mike Krzyzewski \$375,000 per year and a \$1 million bonus).

<sup>20</sup> Matthew Kish, *How Nike Funnels Money to College Football Coaches*, PORTLAND BUS. J. (Sept. 3, 2013, 5:20 PM), [https://www.bizjournals.com/portland/blog/threads\\_and\\_laces/2013/09/how-nike-funnels-money-football-coaches.html](https://www.bizjournals.com/portland/blog/threads_and_laces/2013/09/how-nike-funnels-money-football-coaches.html) (explaining that Ohio State's coach Urban Meyer, at the time, was paid "\$1.4 million each year as part of the school's contract with Nike").

<sup>21</sup> Steve Berkowitz et al., *NCAA Salaries*, USA TODAY, <https://sports.usatoday.com/ncaa/salaries/> (last visited Feb. 11, 2021).

<sup>22</sup> MURPHY, *supra* note 9, at 6.

scholarships help disguise the NCAA's scheme of forcing athletes to attend college as "the only route to the pros."<sup>23</sup> Athletes, such as the Los Angeles Lakers' LeBron James, were previously able to enter professional league drafts<sup>24</sup> directly after high school.<sup>25</sup> This is no longer the case with professional basketball or football, as athletes must complete one or three years, respectively, in college athletics prior to entering each league's respective draft.<sup>26</sup> Because young athletes may no longer pursue other routes to professional leagues, some modern anti-amateurism advocates have urged states to "recognize [that] their own citizens' rights [to choose when to play professionally] have been usurped by the college sports cartel operating out [of] Indianapolis."<sup>27</sup> The shared frustration of anti-amateurism advocates centers on the NCAA receiving a monetary windfall from student-athletes' talents.<sup>28</sup>

Some of these advocates have achieved tangible results by succeeding in lawsuits against the NCAA for creating products which use their name and likeness for profit—specifically in the area of video games.<sup>29</sup> Some state legislatures have also taken notice of

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<sup>23</sup> ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 199 (1999).

<sup>24</sup> The professional draft is the most common route to a career in the NBA, NFL, NHL, and MLB, where all teams in a given league select young athletes in sequential order, in a selection known as a "draft pick." *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Jan. 2, 2021).

<sup>25</sup> See *The Shop Uninterrupted: Season 2, Episode 4* (HBO 2019) (depicting Mr. James explaining how he entered the NBA draft without attending college, which the NBA no longer allows).

<sup>26</sup> Jeffrey A. Rosenthal, *The Amateur Sports Draft: The Best Means to the End?*, 14 MARQ. SPORTS L. REV. 1, 1–4 (1995).

<sup>27</sup> Joseph Nardone, *New York Senator Proposes Bill to Have College Athletes Paid Directly by Schools*, FORBES (Sept. 18, 2019, 4:28 PM), <https://www.forbes.com/sites/josephnardone/2019/09/18/new-york-senator-proposes-bill-to-have-college-athletes-paid-directly-by-schools/#4dd2f9534d17>.

<sup>28</sup> MURPHY, *supra* note 9, at 2.

<sup>29</sup> See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (finding that players, whose likenesses were used in video games, were injured by their inability to receive compensation under NCAA rules); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1276 (9th Cir. 2013) (holding that that a video game developer's use of

these injustices. For example, in 2019, California sought to resolve the bar on compensation for collegiate athletes by enacting the Fair Pay to Play Act.<sup>30</sup> This Act followed some scholars' suggestion that college sports should adopt the Olympic model,<sup>31</sup> whereby student-athletes may financially benefit off their name and likeness via endorsement deals.<sup>32</sup> However, unlike the Olympic model, California's Act<sup>33</sup> does not provide student-athletes equivalent latitude to choose their endorsement deals, because they cannot conflict with those of their universities.<sup>34</sup> Other states have since followed in California's footsteps.<sup>35</sup> In 2019, New York proposed legislation which attempted to mandate that universities directly pay student-athletes a portion of ticket sales.<sup>36</sup> Eventually, the

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student athletes' names and likenesses in its video game franchise was not protected by the First Amendment, thus California's anti-SLAPP suit did not bar student athletes' right of publicity suit).

<sup>30</sup> S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019); see Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), [https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-](https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws)

laws (explaining that the bill is often referred to as the California Fair Pay to Play Act).

<sup>31</sup> See Afshar, *supra* note 3, at 132–33 (comparing the current NCAA amateurism model to Olympic athlete's ability to self-monetize); Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, THE ATLANTIC (July 25, 2012), <https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/> (explaining the Olympic shift away from amateurism and why the NCAA problem is similar).

<sup>32</sup> See Dan Murphy, *Bill to Allow Athletes to Profit from Name Advances*, ESPN (July 9, 2019), [https://www.espn.com/college-sports/story/\\_/id/27156972/bill-allow-athletes-profit-name-advances](https://www.espn.com/college-sports/story/_/id/27156972/bill-allow-athletes-profit-name-advances) (reporting that the Fair Pay to Play Act was approved by the state assembly's Committee on Higher Education).

<sup>33</sup> Cal. S.B. 206 § 67456(e)(1).

<sup>34</sup> *Id.* (“A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract.”).

<sup>35</sup> See Carroll, *supra* note 30 (listing states that are considering, drafting, or proposing legislation that is similar to California's Fair Pay to Play Act).

<sup>36</sup> S.B. 6722B, 2019–2020 Leg., Reg. Sess. § 6438-a(8) (N.Y. 2019).

nationwide momentum favoring reform to student athlete compensation forced the NCAA's hand.<sup>37</sup>

The passage of California's Act and growing pressure across the country motivated the NCAA's announcement of student-athlete compensation reform.<sup>38</sup> In October 2019, it announced it would consider rule changes to allow student-athletes to profit from their names and likenesses by 2021.<sup>39</sup> However, this announcement did not specify the model by which the NCAA would enable players to receive these profits.<sup>40</sup> Moreover, the organization has since suspended a player for taking a direct payment (or "loans") related to his participation in college athletics, even when it derived from a friendly relationships made prior to college.<sup>41</sup> Essentially, college sports is at a cross-roads with a proper solution that still seems far from determined.<sup>42</sup>

Part I of this Note details the NCAA's current amateurism model, exploring its origins and development. Part II provides the historical background of the Olympic shift from an amateur standard to allowing athletes to receive compensation for uses of their names and likenesses. Part III discusses the caselaw that has formed the parameters of constitutional protection of student-athletes' names

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<sup>37</sup> See Steve Almasy et al., *NCAA Says Athletes May Profit from Name, Image and Likeness*, CNN (Oct. 29, 2019, 5:19 PM), <https://www.cnn.com/2019/10/29/us/ncaa-athletes-compensation/index.html> (reporting that, in response to state legislation, the NCAA intended to devise a plan allowing student-athletes to profit off their names and likeness).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* (reporting that the NCAA had not settled on a replacement for the amateurism model).

<sup>41</sup> See *Sources: Ohio State Expects 4-Game Ban for Chase Young*, ESPN (Nov. 9, 2019), [https://www.espn.com/college-football/story/\\_/id/28040392/sources-ohio-state-expects-4-game-ban-chase-young](https://www.espn.com/college-football/story/_/id/28040392/sources-ohio-state-expects-4-game-ban-chase-young) (reporting that former Ohio State football star Chase Young had been suspended for accepting a loan from a family friend).

<sup>42</sup> See Almasy et al., *supra* note 37 ("Figuring out all the details of [allowing players to profit off their name and likeness], it's going to be a challenge. It's a much more complex issue than most people see it as. I think schools are going to be able to work through this process and come up with rules that make . . . great sense for the student athletes and allow universities to continue their collegiate model of athletics.").

and likenesses.<sup>43</sup> Part IV details other litigative attempts at spurring compensation reform, examining student-athletes' failed efforts to be treated as employees of their respective schools or the NCAA.<sup>44</sup> Part V evaluates and identifies the major problems written into proposed states' legislation, including conflicts with seminal case law, antitrust, and first amendment issues. Finally, Part VI suggests a solution to vindicate student-athletes' rights by incorporating the Olympic amateurism model into proposed legislation.

### I. THE NCAA'S CURRENT AMATEURISM MODEL

Initially, the NCAA adopted amateurism as a principled concept, meant to keep all university teams on a level playing field.<sup>45</sup> Originally, the NCAA relied on universities themselves to enforce this honor code. Its first bylaws established:

There should be no participation if [the athlete is] not taking a full schedule of classes, had ever received money for playing, had already participated for four years, and had transferred and not remained athletically inactive until [they] attended for one year. There was a specific rule that prohibited "any football player" from participating again if he left school without attending two-thirds of the previous year.<sup>46</sup>

For over a century, the NCAA has contended that amateurism is one of its bedrock principles.<sup>47</sup> Athletes are meant to play for their school

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<sup>43</sup> See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (refusing to dismiss an anti-trust suit against NCAA on behalf of the student-athletes for the NCAA's profiting off a videogame franchise which contained student-athlete avatars).

<sup>44</sup> See, e.g., *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905, 910 (9th Cir. 2019) (holding NCAA athletes were not employees of the NCAA); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 294 (7th Cir. 2016) (holding student-athletes were not employees).

<sup>45</sup> SMITH, *supra* note 1, at 53–54.

<sup>46</sup> *Id.* at 54.

<sup>47</sup> Testimony of Defendants' Witness, Mark Emmert at 1775-1780, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) No. C-09-3329.

without compensation because they are, first and foremost, students, and thus could not receive any monetary benefits beyond athletic scholarships, room and board, and financial aid.<sup>48</sup>

But amateurism was not a home grown American ideal.<sup>49</sup> Rather, amateurism began as a mythical badge of honor dreamt up by “snooty British elites who enjoyed rowing, winning, and keeping the unwashed, day-laboring masses at arm’s length.”<sup>50</sup> Olympic historian, Bill Mallon, describes British fabrication of Greek amateurism:

Amateurism really started when the people who were rowing boats on the Thames for a living started beating all the rich British aristocrats. . . . That wasn’t right. So they started a concept of amateurism that didn’t exist in ancient Greece, extending it more and more to the notion of being a gentleman, someone who didn’t work for a living and only did sport as a hobby.<sup>51</sup>

The NCAA’s amateurism model has generated a great deal of discourse since its inception.<sup>52</sup> One of the earliest problems was derived from summer baseball leagues.<sup>53</sup> In the 1880s, summer vacation resorts incorporated the “Great American Game” of baseball into the resorts’ amenity packages.<sup>54</sup> Seeking summer employment, college baseball players often entered into arrangements with these resorts, receiving room, board, and a meager allowance to play baseball (among other responsibilities).<sup>55</sup> College teams noticed this trend and levied student athletes’ participation in resort baseball as challenges to rival schools’ stars’ eligibility.<sup>56</sup> As bluntly stated by Francis A. March of Lafayette

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<sup>48</sup> *See id.* at 76-77 (Mark Emmert testified that student-athletes are not supposed to receive benefits outside of scholarships, room and board, and financial aid).

<sup>49</sup> SMITH, *supra* note 1, at 57.

<sup>50</sup> Hruby, *supra* note 31.

<sup>51</sup> *Id.*

<sup>52</sup> SMITH, *supra* note 1, at 52.

<sup>53</sup> *Id.* at 54.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 55.

<sup>56</sup> *Id.*

College, using summer baseball as leverage for student-athlete disqualification was a shameful “bit of snobbishness from across the water, and totally opposed to the American theory of equality.”<sup>57</sup> Such a sentiment echoes the NCAA’s initial struggle to enforce amateurism.

Throughout the early 1900s, the NCAA’s definition of amateurism evolved. Originally, collegiate athletes were not supposed to receive compensation in *any* form, including scholarships.<sup>58</sup> However, for almost the first fifty years of its existence, the NCAA could not directly regulate the schools’ athletic programs.<sup>59</sup> The NCAA’s lack of power allowed individual collegiate athletic conferences to police amateurism themselves until the 1929 Carnegie Report on American College Athletics condemned the practice of intertwining the goals of college athletics and higher education.<sup>60</sup> F.W. Marvel, the physical director at Brown University, explained what the paradoxical relation between universities and student-athletes meant: “[Universities] must conduct our sports and play along amateur lines, but we must finance them along lines that are purely commercial and professional.”<sup>61</sup> In 1939, the NCAA codified amateurism into their constitution but still did not have the financial backing necessary to enforce the code.<sup>62</sup> Finally, in 1948, the NCAA enacted the Sanity Code, thereby gaining the power to enforce the amateurism requirement.<sup>63</sup> However, the enactment did not bar any compensation whatsoever; instead, it allowed for student-athletes to receive funds for tuition and other fees.<sup>64</sup> Some contended these benefits undermined the original interpretation of amateurism, foreshadowing the modern lack of expansion of benefits for student-athletes.<sup>65</sup> Currently, approved academic funding and a \$2,000

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<sup>57</sup> *Id.* at 58.

<sup>58</sup> Afshar, *supra* note 3, at 109.

<sup>59</sup> SMITH, *supra* note 1, at 53.

<sup>60</sup> *Id.* at 60.

<sup>61</sup> *Id.* at 61.

<sup>62</sup> *Id.* at 90–91.

<sup>63</sup> *Id.* at 95–96.

<sup>64</sup> *Id.* at 96.

<sup>65</sup> *Id.*

stipend for living costs are the only acceptable benefits a collegiate athlete may receive.<sup>66</sup>

Although NCAA-compliant benefits remained consistent over the years, powerful and wealthy individuals began to illicitly compensate student-athletes.<sup>67</sup> High-profile collegiate athletes are constantly tempted with improper benefits from alumni, boosters, and agents.<sup>68</sup> These “overzealous alums” are the reason many players get caught in “opportunistic entanglement[s],” with the consequences ultimately borne by the athletes.<sup>69</sup> Penalties for accepting improper benefits can range from the violating player being ruled ineligible—adversely impacting their future professional status<sup>70</sup>—to forced charitable donations of thousands of dollars.<sup>71</sup> Further, violations of the amateurism rule are questionable, as players have been penalized for merely attending sponsored parties in Miami,<sup>72</sup> or not disclosing friendly relationships with professional players.<sup>73</sup> In response, some legal scholars took the position that allowing student-athletes to accept

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<sup>66</sup> Afshar, *supra* note 3, at 109.

<sup>67</sup> Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA’s Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L. J. 371, 398–99 (2012).

<sup>68</sup> Afshar, *supra* note 3, at 109.

<sup>69</sup> Shropshire, *supra* note 10, at 48.

<sup>70</sup> See Dan Van Wie, *The 25 Most Unexpected Free Falls in NFL Draft History*, BLEACHER REP. (Apr. 24, 2012), <https://bleacherreport.com/articles/1152908-the-25-most-unexpected-free-falls-in-nfl-draft-history> (explaining that former college football players Andre Smith and Marvin Austin fell in their respective NFL drafts due to questions about their maturity because they were suspended for accepting improper benefits in college).

<sup>71</sup> Bailey Brautigan, *Cam Newton and 10 College Athletes in Scandal: Is It Their Fault or the System?*, BLEACHER REP. (Nov. 10, 2010), <https://bleacherreport.com/articles/514177-10-college-athletes-involved-in-scandals-is-it-their-fault-or-the-system> (explaining that after attending an “agent-sponsored” party in Miami, Alabama defensive lineman Marcell Dareus was ruled ineligible for two games and forced to donate \$1,787 to charity before returning from suspension).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (explaining that former Oklahoma State receiver Dez Bryant was ruled ineligible for part of the 2009 season for failing to disclose a mentor-mentee relationship with Deion Sanders).

endorsements might curb the rampant temptations created by professional sports agents teasing improper benefits to entice student-athletes into future representation agreements.<sup>74</sup>

Regardless of the inconsistent application of its amateurism rule, the NCAA argues this model drives the appeal of college sports in comparison to other developmental leagues.<sup>75</sup> Specifically, it compares its fan base to minor league sports, concluding that, as a result of embracing amateurism, it dominates the developmental sports fan base.<sup>76</sup> It bases this conclusion largely on the sense of community that it contends is fostered when fans are watching and cheering for players who are competing, ostensibly, for school pride.<sup>77</sup> Further, students and universities benefit from the amateur model because it creates a wide latitude of options corresponding to the numerous factors that go into making a choice to attend a certain university.<sup>78</sup> Large programs can offer students prestigious education, higher chances of making professional sports teams and the opportunity to compete for national championships.<sup>79</sup> Conversely, small programs can lure students with tight knit communities, offer less-highly recruited athletes starting positions, and promise scholarships a larger school might not offer.<sup>80</sup>

Champions of amateurism wholly embrace the community aspect of college sports, while their critics have taken every opportunity to lambast and mock these sentiments:

Carolina president Harris Pastides said that paying players would create a “wedge” between them and their classmates, and make uncompensated, non-revenue-sport athletes feel ‘worse about themselves.’ NCAA president Mark Emmert, meanwhile, fretted

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<sup>74</sup> Corgan, *supra* note 67, at 415.

<sup>75</sup> Testimony of Defendants’ Witness, Mark Emmert at 1769, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) No. C-09-3329 (opining that developmental leagues are less successful than the NCAA due to amateurism).

<sup>76</sup> *See id.* (opining that minor league sports are not particularly successful).

<sup>77</sup> *See id.* (opining that amateurism is important to the college athletics fanbase).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

that if an “athlete was being paid and it changed significantly their lifestyle, they probably would not be living in a residence hall. They probably would not be eating in the cafeteria, they probably would not be as—as active a member or participant in the life of a campus.” [The Author’s retort:] Translation? *If we pay them, they won’t hang out on the quad.* The Horror.<sup>81</sup>

These critics’ skepticism and cynicism has not changed since the NCAA announcement.<sup>82</sup>

Because of the NCAA’s long held desire to keep players at full-amateur status, it is likely any change with respect to a player’s ability to market their name and likeness will be heavily restricted.<sup>83</sup> Some college sports analysts have even expressed their belief that the NCAA’s ruling is purely an attempt to “stall,” seeing it as very unlikely that it will be willing to abandon a principle that it has continuously asserted is vital to its model.<sup>84</sup> Even at this stage, the NCAA itself has tempered expectations, explaining any rule change will still be “in a manner consistent with the collegiate model.”<sup>85</sup> Thus, many skeptically believe that it will merely issue “severely limited and regulated (changes) with very little consequence and

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<sup>81</sup> Patrick Hruby, *Amateurism Isn’t Educational: Debunking the NCAA’s Dumbest Lie*, VICE (June 14, 2017, 9:00 AM), [https://www.vice.com/en\\_us/article/kzqevz/amateurism-isnt-educational-debunking-the-ncaas-dumbest-lie](https://www.vice.com/en_us/article/kzqevz/amateurism-isnt-educational-debunking-the-ncaas-dumbest-lie).

<sup>82</sup> David K. Li, *NCAA Takes Steps to Allow College Athletes to Cash In on Their Fame*, NBC NEWS (Oct. 29, 2019, 2:21 PM), <https://www.nbcnews.com/news/us-news/ncaa-takes-steps-allow-student-athletes-cash-their-fame-n1073436>.

<sup>83</sup> Will Hobson, *NCAA Softens on Allowing College Athletes to Be Paid, but Provides Few Specifics*, WASH. POST (Oct. 29, 2019, 3:52 PM), [https://www.washingtonpost.com/sports/colleges/ncaa-softens-public-stance-on-athlete-amateurism-provides-few-specifics/2019/10/29/4378b1f0-fa7a-11e9-8906-ab6b60de9124\\_story.html](https://www.washingtonpost.com/sports/colleges/ncaa-softens-public-stance-on-athlete-amateurism-provides-few-specifics/2019/10/29/4378b1f0-fa7a-11e9-8906-ab6b60de9124_story.html).

<sup>84</sup> E.g., Scott Gleeson, *Jay Bilas Calls the NCAA’s Proposal to Pay Athletes a Bluff: It’s ‘Frankly Embarrassing’*, USA TODAY, <https://www.usatoday.com/story/sports/ncaab/2019/10/31/jay-bilas-ncaa-proposal-name-image-likeness/4108076002/> (last updated Nov. 1, 2019, 2:05 PM) (noting that former Duke basketball player Jay Bilas has vocalized his skepticism on the NCAA’s recent proposal); Murphy, *supra* note 32.

<sup>85</sup> Gleeson, *supra* note 84.

benefit to the players.”<sup>86</sup> Essentially, the media expectation is that the NCAA will sluggishly move toward conservative rule changes.<sup>87</sup> Regardless of its disposition, 38 of the 400 pages of the NCAA Division I manual is devoted to keeping money from student-athletes.<sup>88</sup> Thus, the NCAA is likely in no rush to make new rule changes, as it will require a complete overhaul of its extremely profitable system.

## II. THE OLYMPIC MOVE FROM STRICT AMATEURISM

### A. *Early History of Olympic Amateurism*

The ancient Greek Olympian is often fallaciously alluded to as the gold standard of amateurism.<sup>89</sup> The Olympics arose over a time where the athlete purely participated in “sports for the glory . . . alone.”<sup>90</sup> As noted above, there is “no mention of amateurism in Greek sources, no reference to amateur athletes [and] no evidence that the concept of amateurism was even known in antiquity.”<sup>91</sup> “The truth is that ‘amateur’ is one thing for which the ancient Greeks never had a word.”<sup>92</sup> Regardless, the modern Olympics has moved on from the fabled tradition of amateurism.<sup>93</sup> Original rules for global sporting competitions like the Henley Regatta<sup>94</sup> required, “no person shall be considered an amateur oarsman or sculler . . . who is or has been by trade or employment

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<sup>86</sup> *Id.* (internal quotations omitted).

<sup>87</sup> Li, *supra* note 82.

<sup>88</sup> MURPHY, *supra* note 32, at 4.

<sup>89</sup> Shropshire, *supra* note 10.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Teddy Nykiel, *2018 US Olympians Open up About Money Struggles*, CNBC (Feb. 15, 2018, 3:05 PM), <https://www.cnbc.com/2018/02/15/2018-us-olympians-open-up-about-money-struggles.html> (detailing how lower tier Olympic athletes receive compensation).

<sup>94</sup> Peter Scott, *2021 Royal Canadian Henley Regatta*, ROYAL CANADIAN HENLEY REGATTA (Jan. 28, 2021), <https://www.henleyregatta.ca/> (explaining that the Henley Regatta is a world-renowned crew rowing competition).

for wages a mechanic, artisan, or laborer.”<sup>95</sup> However, the 1892 Olympic Congress believed such a rule unfairly prejudiced individuals who “made [their] living by [their] hands.”<sup>96</sup> Accordingly, the Olympic Congress relaxed its ban on employment.<sup>97</sup>

Amateurism quickly began to deteriorate in the 1900s, marked by the disgrace of iconic Olympic athletes.<sup>98</sup> In 1912, Jim Thorpe placed first in the Olympic pentathlon<sup>99</sup> by winning four of five events, thus earning the first Olympic decathlon<sup>100</sup> by winning four of ten events, all while wearing mismatched shoes.<sup>101</sup> No Olympian has achieved a similar feat since, arguably making him the “greatest athlete of all time.”<sup>102</sup> However, the International Olympic Committee (“IOC”) stripped him of all medals and records after learning he had participated in the 1909–1910 professional minor league baseball season, thereby dismantling his amateur status.<sup>103</sup>

The major ideological turning point was the IOC’s refusal to distinguish between the economic structures of Eastern and Western

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<sup>95</sup> L.A. Jennings, *For Love or for Money: A History of Amateurism in the Olympic Games*, VICE (June 7, 2016, 2:25 PM), [https://www.vice.com/en\\_us/article/gvaqdm/for-love-or-for-money-a-history-of-amateurism-in-the-olympic-games](https://www.vice.com/en_us/article/gvaqdm/for-love-or-for-money-a-history-of-amateurism-in-the-olympic-games).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Sally Jenkins, *Why Are Jim Thorpe’s Olympic Records Still not Recognized?*, SMITHSONIAN MAG. (July 2012), <https://www.smithsonianmag.com/history/why-are-jim-thorpes-olympic-records-still-not-recognized-130986336/>.

<sup>99</sup> The modern Olympic pentathlon consists of fencing, freestyle swimming, equestrian show jumping, and a final combined event of cross country running and pistol shooting. *Modern Pentathlon*, OLYMPICS, <https://www.olympic.org/modern-pentathlon> (last visited Jan. 2, 2021).

<sup>100</sup> The modern Olympic decathlon consists of 100-meter dash, long jump, shot put, high jump, 400-meter dash, 110-meter hurdles, discus throw, pole vault, javelin throw, and 1500-meter dash. *Decathlon*, WORLD ATHLETICS, <https://www.worldathletics.org/disciplines/combined-events/decathlon> (last visited Feb. 12, 2021).

<sup>101</sup> Jenkins, *supra* note 98.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Hemisphere sports.<sup>104</sup> The western nations built private leagues whose players the IOC barred due to the Olympic amateurism requirement.<sup>105</sup> Meanwhile, eastern nations' sports were "state sponsored," allowing their players to preserve amateur status, despite nations covering athletes' expenses.<sup>106</sup> In 1985, the IOC finally realized that state-sponsorship simply disguised Eastern Hemisphere athletes' ability to receive compensation, and relented by allowing its first professional athletes to compete in tennis, ice hockey and soccer, so long as the player was under age twenty-three.<sup>107</sup> Further, in 1988, it adapted its model of amateurism to allow individual nations to award their medaling athletes monetary bonuses.<sup>108</sup> Due to the complexities of international sporting rules and individual agreements with the IOC, professionals were allowed to compete on a sport-by-sport basis (with the most recent sport integrating to the new rule being boxing in 2016).<sup>109</sup> This left wrestling as the last amateur-only Olympic sport.<sup>110</sup>

### *B. The Current Olympic Model of Amateurism*

Olympic athletes are by no means directly paid for their participation, evidencing a malleable model of amateurism.<sup>111</sup> The IOC does not directly pay athletes a dime; rather, Olympians can

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<sup>104</sup> See Frank Litsky, *I.O.C. Expected to Ease Amateur Policy*, N.Y. TIMES (Mar. 30, 1986), <https://www.nytimes.com/1986/03/30/sports/ioc-expected-to-ease-amateur-policy.html> (detailing that the I.O.C. decided to ease its amateurism policy).

<sup>105</sup> See *id.* (stating that the I.O.C. initially did not allow professional athletes, the majority of which played in the western hemisphere, to compete in the Olympics).

<sup>106</sup> *Id.*

<sup>107</sup> Robert Mcg. Thomas Jr., *Olympics to Allow Pros in 3 Sports*, N.Y. TIMES (Mar. 1, 1985), <https://www.nytimes.com/1985/03/01/sports/olympics-to-allow-pros-in-3-sports.html>.

<sup>108</sup> Jennings, *supra* note 95; see Nykiel, *supra* note 93 (reporting that at the 2018 Olympic games, U.S. athletes will earn \$37,500 for each gold medal, \$22,500 for each silver, and \$15,000 for each bronze).

<sup>109</sup> Jennings, *supra* note 95.

<sup>110</sup> *Id.*

<sup>111</sup> See Nykiel, *supra* note 93 (detailing how Olympians who did not receive compensation for medaling earn money).

win prize money from their local Olympic Committees.<sup>112</sup> In fact, many athletes crowd source their funding or rely on sponsorships.<sup>113</sup> Further, these sponsorships are available to athletes who do not medal.<sup>114</sup> Although athletes have admitted they wish they could focus purely on the perfection of their sport and less on the monetary aspect, the fact remains that without this funding, they would be less equipped to pursue their passion.<sup>115</sup>

### III. THE PARAMETERS OF STATUTORY AND CONSTITUTIONAL PROTECTION OVER STUDENT-ATHLETES' NAMES AND LIKENESSES

Regardless of scholarly debate over amateurism, student-athletes themselves have made numerous attempts to recover the profits they believe college athletics has improperly reaped from their talents. The campaign to vindicate student-athletes' rights through litigation began with lawsuits against the NCAA for the improper use of players' names and likenesses in video games.<sup>116</sup>

#### *A. Student-Athletes' Names and Likenesses Are Protected Against Commercial Use in Videogames*

In 2008, Ed O'Bannon visited a friend whose son recognized the UCLA All American basketball player from the video game *NCAA Basketball*, a game developed by Electronic Arts ("EA"). O'Bannon noticed that the player avatar not only resembled him, but shared his jersey number as well.<sup>117</sup> Around the same time, former Arizona

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (reporting that non-medaling Olympians often can still command significant endorsement dollars from local or specialized brands).

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g., O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (student-athletes brought class action anti-trust suit against NCAA for profiting off video game which exploited players' names and likenesses); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (student-athletes brought suit against EA Sports for producing video game franchise which exploited players' names and likenesses).

<sup>117</sup> *O'Bannon*, 802 F.3d at 1055.

State University and University of Nebraska quarterback, Sam Keller, also discovered that EA had copied his name and likeness into the popular game *NCAA Football*.<sup>118</sup> Both players, like many other NCAA athletes, never consented for their likeness to be used, nor did either ever have the opportunity to share in the profits EA and the NCAA secured by sales of the games.<sup>119</sup> Naturally, the athletes contended the NCAA and EA's agreement to exploit players' names and likenesses was unlawful.<sup>120</sup>

In *O'Bannon v. National Collegiate Athletic Association* and *Keller v. Electronic Arts, Inc.*, Ed O'Bannon and Sam Keller separately sued the NCAA and EA for each entity's role in their licensing agreement.<sup>121</sup> Although the student-athletes initiated each action separately, the California district court eventually consolidated *O'Bannon* and *Keller* during pretrial proceedings and certified the consolidation action as a class action dubbed *In re NCAA Student Athlete Name & Likeness Licensing Litig.*<sup>122</sup> The Ninth Circuit decided Mr. Keller's right of publicity claims in *In re NCAA*, and then, after deconsolidating the actions, decided Mr. O'Bannon's anti-trust claims in *O'Bannon*.<sup>123</sup>

#### i. Mr. Keller's Right of Publicity Claims

Prior to consolidation, the district court had already denied EA's motion to dismiss the right of publicity claims.<sup>124</sup> Post

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<sup>118</sup> *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1267–68.

<sup>119</sup> *O'Bannon*, 802 F.3d at 1055; *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1267–68.

<sup>120</sup> See *O'Bannon*, 802 F.3d 1049, 1055 (noting that the “gravamen of [O'Bannon's] complaint was . . . the NCAA's amateurism rules”).

<sup>121</sup> *O'Bannon*, 802 F.3d at 1055, 1067 (noting that the student-athletes alleged antitrust violations under the Sherman Act because the NCAA “foreclosed the market” for their names, images, and likeness in videogames); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1271.

<sup>122</sup> *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1271.

<sup>123</sup> *O'Bannon*, 802 F.3d at 1056–57.

<sup>124</sup> California's anti-SNAPP statute reads:

[A] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free

consolidation, EA appealed to the Ninth Circuit asserting the district court should have ruled, as a matter of law, that California's anti-SNAPP statute<sup>125</sup>—meant to amplify First Amendment affirmative defenses against right of publicity claims—barred the student-athletes' right of publicity claims.<sup>126</sup> Upholding the district court ruling, the Ninth Circuit held none of the asserted affirmative defenses, including the transformative use defense,<sup>127</sup> barred the plaintiffs from prevailing on the merits.<sup>128</sup>

The Ninth Circuit rooted its holding in the Third Circuit's reasoning in *Hart v. Electronic Arts*.<sup>129</sup> In *Hart*, the Third Circuit similarly rejected EA's argument that it had satisfied the transformative use test by creating virtual avatars modeled after student-athletes, because EA's video game *NCAA Football* intentionally depicted realistic representations of the players.<sup>130</sup> Thus, the Ninth Circuit refused to allow EA to "escape liability" for exploiting a student-athlete's likeness simply by virtue of using a virtual avatar, and denied EA First Amendment protection.<sup>131</sup> It reasoned that much of the value in *NCAA Football* concerned the realistic depictions of the players, and thus it was the player's likeness—not the avatar EA created—that drove the commercial success of the franchise.<sup>132</sup>

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speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

*In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1272.

<sup>125</sup> *Id.* at 1267–68.

<sup>126</sup> *Id.* at 1278–79.

<sup>127</sup> *O'Bannon*, 802 F.3d at 1055. The transformative use test is a "balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Id.*

<sup>128</sup> *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1267–68.

<sup>129</sup> See *id.* at 1278–81 (discussing the *Hart* holding at length, which the Third Circuit had decided just months before).

<sup>130</sup> *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 168 (3d Cir. 2013).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 169.

ii. The *O'Bannon* Anti-Trust Claims

Post-deconsolidation of *In re NCAA*, the district court conducted a bench trial on the anti-trust claims alleged in *O'Bannon*. There, the court concluded that, under the Sherman Anti-Trust Act, “the NCAA’s rules have an anticompetitive effect on the college education market.”<sup>133</sup> The court also rejected the NCAA’s contention that “it had a ‘longstanding commitment to amateurism;’” rather, finding the NCAA’s definition of amateurism to be “‘malleable,’ changing frequently over time in ‘significant and contradictory ways.’”<sup>134</sup> Ultimately, the district court agreed that the plaintiffs had stated two “less restrictive alternatives” to NCAA rules preventing EA from compensating the student-athletes for licensing rights:

- (1) allowing schools to award stipends to student-athletes up to the full cost of attendance, thereby making up for any ‘shortfall’ in their grants-in-aid;
- and (2) permitting schools to hold a portion of their licensing revenues in trust, to be distributed to student-athletes in equal shares after they leave college.<sup>135</sup>

While embracing these possibilities, the court denied the plaintiffs’ proposal to allow student-athletes to be compensated by “school-approved endorsements.”<sup>136</sup> Following this determination, it issued an injunction against the NCAA and ordered them to permit “up to \$5,000 in deferred compensation” for the players’ names, images, and likenesses, holding the funds in trust until they leave school.<sup>137</sup>

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<sup>133</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1057 (9th Cir. 2015) (“Were it not for [amateurism] rules, the court explained, schools would compete with each other by offering recruits compensation exceeding the cost of attendance, which would effectively lower the price that the recruits must pay for the combination of education and athletic opportunities that the schools provide.”).

<sup>134</sup> *Id.* at 1058.

<sup>135</sup> *Id.* at 1060–61.

<sup>136</sup> *Id.* at 1084 n.8.

<sup>137</sup> *Id.* at 1061.

On appeal, the Ninth Circuit affirmed the district court's rationale that the NCAA was "subject to anti-trust scrutiny."<sup>138</sup> However, it reversed the lower court's order to permit schools to compensate the student-athletes up to \$5,000 upon leaving school,<sup>139</sup> writing:

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point. . . . At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its 'particular brand of football' to minor league status.<sup>140</sup>

Thus, the Ninth Circuit agreed the NCAA had been overly restrictive in its compensation policy, but nonetheless refused to order payment above cost of attendance to avoid violating the sanctity of amateurism.<sup>141</sup> In the end, the NCAA settled with the athletes to avoid continued litigation over the anti-trust claim.<sup>142</sup>

The Ninth Circuit's position on EA's intentional misappropriation of these student-athletes' individual names and likenesses is perhaps best summarized by the District Court's opinion: "It seems ludicrous to question whether video game consumers enjoy and, as a result, purchase more EA-produced video games as a result of the heightened realism associated with actual players."<sup>143</sup> Notwithstanding that sentiment, and in an unwavering

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<sup>138</sup> *Id.* at 1079.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1078–79.

<sup>141</sup> *Id.* at 1079.

<sup>142</sup> See Ben Estes, *Judge Gives Preliminary Approval for Settlement in Video Game Case*, SPORTS ILLUSTRATED (July 25, 2014), <https://www.si.com/college-football/2014/07/25/judge-claudia-wilken-approves-60-million-settlement-video-game-case> (explaining that Electronic Arts settled their portion of the lawsuit for \$40 million and that the NCAA followed suit, agreeing to a \$20 million settlement one year after).

<sup>143</sup> *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 783 (D.N.J. 2011).

commitment to amateurism, the court was still unwilling to order the NCAA or the universities to directly pay players for such uses.<sup>144</sup>

*B. Students Athletes' Names and Likenesses are Not Protected Against Use in Fantasy Sports*

Although the *O'Bannon* ruling helped protect student-athletes' names and likeness from exploitation, they soon suffered a setback in *Daniels v. FanDuel, Inc.*<sup>145</sup> FanDuel and its defendant counterparts are daily fantasy sports websites where players (any user who logs onto the website and makes a wager) enter competitions with other players to draft a statistically optimal team of college athletes for a given period of time.<sup>146</sup> Players whose teams perform the best over the time period receive monetary payouts.<sup>147</sup> Daily fantasy sports players buy into certain fantasy pools, from which they are allocated a set amount of online currency.<sup>148</sup> Players then attempt to win the entire pool by most efficiently allocating their online currency among players with the highest individual statistical successes in the given sport.<sup>149</sup>

The plaintiffs in *FanDuel* were collegiate student-athletes whose individual statistics were published by the defendants for the

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<sup>144</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015).

<sup>145</sup> See generally *Daniels v. FanDuel, Inc.*, No. 1:16-CV-01230-TWP-DKL, 2017 WL 4340329 (S.D. Ind. Sept. 29, 2017) (holding that statutory exceptions shield defendants from liability under Indiana's right-of-publicity statute).

<sup>146</sup> *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 392 (Ind. 2018).

<sup>147</sup> See *Rules & Scoring*, DRAFTKINGS DAILY FANTASY, <https://www.draftkings.com/help/rules/1/1> (last visited Nov. 22, 2020) (explaining different available sports, games, and rules).

<sup>148</sup> See *id.* (listing different types of pools to buy into and the associated rules).

<sup>149</sup> For example, Player A buys into the Saturday College Football pool for \$10, where the first prize in the pool is \$10,000, so Player A would, like all other players who buy into the pool, get 100 "fantasy" dollars with which they can "buy" certain players, who are all assigned values based on their projected individual statistical success. In essence, Player A is attempting to allocate the 100 fantasy dollars amongst players who will have the best individual success among all others in the given pool. For further explanation, See *id.* (discussing daily fantasy rules).

purposes of providing their daily fantasy service to their users.<sup>150</sup> This allowed paying consumers to access “detailed information such as Plaintiffs’ names, images, and statistics, assess the athletes’ weekly performances, and assemble a virtual team of real-life athletes.”<sup>151</sup> Thus, like the *O’Bannon* line of cases, the plaintiffs in *FanDuel* argued the defendants’ public exploitation of this information for profit constituted an improper use of their names and likeness.

The plaintiffs in *FanDuel* relied on Indiana’s Right of Publicity statute which bars a person from using “an aspect of a personality’s right of publicity for commercial purpose during the personality’s lifetime.”<sup>152</sup> The Southern District of Indiana dismissed the case, relying on the statute’s “newsworthiness” exception, which excludes “the use of a personality’s name, . . . image, [and] likeness in material that has political or newsworthy value,”<sup>153</sup> and the public interest exception, which excludes the use of a person’s right to publicity “in connection with the broadcast or reporting of an event or a topic of general or public interest.”<sup>154</sup> The Court used the same rationale to fulfill each exception, distinguishing these websites from the videogame avatars in *In re NCAA*<sup>155</sup> by holding the defendants’ sites “provide factual data, and their websites could be used as ‘reference sources,’ either for purposes of playing the associated [daily fantasy] game, or for information about the collegiate sports and athletes.”<sup>156</sup> Though the plaintiffs attempted to characterize the defendants’ site as an illegal gambling operation, which they argued would preclude the defendants from utilizing any of the statutory exceptions, the court declined to make a ruling on this issue, determining the legality of the conduct would not affect the statutory exemptions.<sup>157</sup>

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<sup>150</sup> *FanDuel, Inc.*, 109 N.E.3d at 392.

<sup>151</sup> *Id.*

<sup>152</sup> *Daniels v. FanDuel, Inc.*, No. 1:16-CV-01230-TWP-DKL, 2017 WL 4340329, at \*2 (S.D. Ind. Sept. 29, 2017).

<sup>153</sup> *Id.* at \*3, \*7.

<sup>154</sup> *Id.*

<sup>155</sup> *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280 (9th Cir. 2013).

<sup>156</sup> *FanDuel, Inc.*, 2017 WL 4340329, at \*9.

<sup>157</sup> *Id.* at \*10.

The plaintiffs appealed on grounds that the defendants' entire operation of daily fantasy games was a criminal enterprise akin to illegal gambling,<sup>158</sup> again arguing that the "newsworthy value" exception should not apply to criminal activity.<sup>159</sup> The Seventh Circuit rejected the argument and affirmed, reiterating the district court's opinion that the Indiana Supreme Court "could have articulated [an illegality] exception" to the "newsworthy value" and "public interest" exceptions and did not.<sup>160</sup> Refusing to reinterpret Indiana law, the Seventh Circuit upheld the district court ruling that the use of a player's photo and statistics in daily fantasy pools is exempt from a student-athletes' right of publicity.<sup>161</sup>

#### IV. STUDENT-ATHLETES ARE NOT EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT

Appellate courts have regularly upheld dismissals of student-athletes' actions against their former universities and the NCAA where they alleged their relationship with the two was that of an employee and employer.<sup>162</sup> In *Berger v. NCAA*, the Seventh Circuit upheld a lower court ruling dismissing the former University of Pennsylvania women's track and field athletes' complaint against the university and the NCAA for violations of the Fair Labor Standards Act ("FLSA").<sup>163</sup> The Seventh Circuit first found that, under the FLSA, the plaintiffs lacked standing to sue the NCAA or universities other than the University of Pennsylvania, because their relationships to those entities were "far too tenuous to be considered an employment relationship."<sup>164</sup> The court then evaluated the FLSA

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<sup>158</sup> *Daniels v. FanDuel, Inc.*, 909 F.3d 876, 878 (7th Cir. 2018).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See, e.g., Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016) (dismissing FLSA claim, holding plaintiffs lacked standing to bring suit as they were not employees of the NCAA or their university); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905 (9th Cir. 2019) (dismissing class action under the FLSA and California Labor Code because the student-athletes were not employees).

<sup>163</sup> *Berger*, 843 F.3d at 288.

<sup>164</sup> *Id.* at 289.

claim against the university itself, holding that in light of the economic reality of the working relationship,<sup>165</sup> it could not be considered an employer of the players due to the “revered tradition of amateurism in college sports.”<sup>166</sup> Although it might have, the court declined to apply a “multi-factor” economic reality test because it “failed to capture the true nature of the relationship” between student-athletes and the university.<sup>167</sup> Rather, the court opted for a “flexible” totality of the circumstances approach to the economic realities test, emphasizing that amateurism “define[s] the economic reality of the relationship between the student-athletes and their schools.”<sup>168</sup> Overall, the court concluded, amateurism prevents student-athletes from being considered employees under the FLSA.<sup>169</sup>

Similarly, in *Dawson v. National Collegiate Athletic Association*, the Ninth Circuit upheld the dismissal of a class action complaint made by former student-athletes, because, as it found, they were not employees—under the FLSA or California Labor Code—of the NCAA, the Pacific Athletic Conference Twelve (“PAC-12”), or their former universities.<sup>170</sup> Unlike *Berger*, however, the *Dawson* Court did apply the *multi-factor* economic reality test to determine whether an employer-employee relationship existed.<sup>171</sup> Agreeing with the lower court’s ruling, the Ninth Circuit found that the plaintiffs did not satisfy the factors of the multi-factor test because the NCAA and PAC-12 were “regulatory bodies, not employers of student-athletes under the FLSA.”<sup>172</sup> As it reasoned,

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<sup>165</sup> *Id.* at 290 (“[T]he test for employment under the FLSA is one of ‘economic reality’ . . . which accounts for the circumstances of the whole activity rather than considering isolated factors.”).

<sup>166</sup> *Id.* at 291 (quoting *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 120 (1984)).

<sup>167</sup> *Id.* (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992)).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 294.

<sup>170</sup> *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905, 913–14 (9th Cir. 2019).

<sup>171</sup> *See id.* (“[C]ircumstances relevant in evaluating economic reality . . . includ[e]: (1) expectation of compensation, (2) the power to hire and fire, (3) and evidence that an arrangement was ‘conceived or carried out to evade the law.’”) (internal citations omitted).

<sup>172</sup> *See id.* at 911.

the schools these entities regulated were not “in the business of playing football and basketball,” and the students were not “hired by the school to compete in interscholastic competition.”<sup>173</sup> Additionally, the Ninth Circuit found the plaintiffs were not employees of their respective universities under California Labor Law because California courts had consistently held otherwise.<sup>174</sup> It justified its reliance on these prior holdings by pointing out that California’s legislature had refused to classify student-athletes as employees, even where athletes received scholarships.<sup>175</sup>

The takeaway from *Berger* and *Dawson* is that, seemingly under whichever economic reality test might be used to determine the existence of an employer-employee relationship, courts still summarily refuse to extend FLSA employee protections to student-athletes.<sup>176</sup> Of course, the *Dawson* dismissal was particularly crushing for student-athletes as it derived from the multi-factor test<sup>177</sup>—the plaintiffs’ preference in *Berger* under which that court refused to conduct its analysis.<sup>178</sup> Thus, even under plaintiffs’ most favorable interpretation of the economic reality test, courts are seemingly unwilling to extend them the protections granted to employees under the FLSA.

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<sup>173</sup> *Dawson v. Nat’l Collegiate Athletic Ass’n*, 250 F. Supp. 3d 401, 408 (N.D. Cal. 2017).

<sup>174</sup> See *Dawson*, 932 F.3d at 912–13 (detailing California appellate court decisions that have held that (1) student-athletes are not employees of their respective universities, and thus those universities are not liable for torts committed by student-athletes during competitions, and (2) that student-athletes, not being employees of their respective universities, cannot state claims for violations of the California Fair Employment and Housing Act).

<sup>175</sup> *Id.* at 913. California’s Education Code acknowledges students spend almost “40 hours per week participating in their respective sports” and “generate large revenues,” but that “[i]nstead of extending employment-related protections to student-athletes,” California’s legislature upheld the status quo of “scholarship compensation,” “life skill workshops,” university payment of student insurance deductibles, “medical expenses for injured students,” and “due process protections for student-athletes involved in disciplinary actions . . .” *Id.*

<sup>176</sup> *Id.* at 912–13; *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 290 (7th Cir. 2016).

<sup>177</sup> See *Dawson*, 932 F.3d at 910–11 (applying the multi-factor test).

<sup>178</sup> *Berger*, 843 F.3d at 291.

V. CURRENT LEGISLATION EXPANDS BEYOND STUDENTS  
PROFITING OFF OF THEIR NAMES AND LIKENESSES

College athletic programs now find themselves at a similar crossroads as the Olympics found itself in the mid-1980s; NCAA officials have been forced to allow students to profit in some way off of their name and likeness.<sup>179</sup> Thus, the issue is not a matter of whether amateurism will be eliminated, but rather, to what degree its principles should survive when determining the manner in which college athletes will receive compensation.<sup>180</sup> Currently, California and New York have proposed or enacted statutes which provide student-athletes the right to profit off their name and likeness.<sup>181</sup> However, both statutes maintain unique caveats to a player's ability to profit. California's statute provides that a player's endorsement cannot conflict with any pre-existing university endorsement.<sup>182</sup> New York's proposed bill mandates athletes receive fifteen percent of revenue generated from ticket sales and that schools set up a fund for permanently injured athletes.<sup>183</sup> Both of these provisions indicate distinct and troubling deviations from warnings within the *O'Bannon* and *Berger* line of judicial opinions.<sup>184</sup>

*A. New York's Bill Mandates Schools Pay a Percentage of  
Their Sponsorship Deals to Students—Indicating a Shift  
to a Problematic Privatized Model*

New York's bill builds on the rulings in *Berger* and *O'Bannon* in a manner that greatly expands a player's right to compensation.

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<sup>179</sup> Almasy et al., *supra* note 37.

<sup>180</sup> *Id.*

<sup>181</sup> S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019); S.B. 6722B, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

<sup>182</sup> Cal. S.B. 206.

<sup>183</sup> N.Y. S.B. 6722B §§ 6438-a(7), (8).

<sup>184</sup> See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015) (refusing to allow the student-athletes to receive direct payments for their involvement in college sports out of concern that the line between privatized athletics and college sports would no longer exist); *Berger*, 843 F.3d at 293.

This is because it mandates direct payments of a percentage of ticket sales to student-athletes:

8. At the conclusion of each school year, each college shall take fifteen percent of the revenue earned from ticket sales to all athletic events and divide and pay such amount to all student-athletes.<sup>185</sup>

New York's bill is a gratuitous enlargement of the *O'Bannon* holding. Under *O'Bannon*, the court simply confirmed that third-parties could not unilaterally license use of players' names and likenesses.<sup>186</sup> Further, it refused to acknowledge whether the NCAA had acted improperly by denying the players the right to profit off of their image while maintaining the status of a college athlete.<sup>187</sup> Thus, even though the *O'Bannon* court held the NCAA wrongfully exploited the player's name and likenesses, it refused to allow student-athletes to receive direct payments in addition to the cost of attendance.<sup>188</sup>

By mandating that universities directly pay athletes a predetermined portion of ticket sales, New York's bill also goes beyond the Olympic athlete compensation model. Neither the International Olympic Committee nor individual nations directly pay Olympians a guaranteed portion of revenues.<sup>189</sup> Olympians only receive money in relationship to their athletic achievements through endorsement deals, cost of living stipends from their nation's teams, and by winning medal bonuses paid out by their respective national committees.<sup>190</sup> By contrast, New York's direct compensation provision is the sort of guaranteed payment one might expect in professional sports, where players have contracts guaranteeing their salary.<sup>191</sup> In this way, the New York bill resembles a shift past the

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<sup>185</sup> N.Y. S.B. 6722B § 6438-a(8).

<sup>186</sup> *O'Bannon*, 802 F.3d at 1067–69.

<sup>187</sup> *See id.* at 1077–78.

<sup>188</sup> *Id.* at 1079.

<sup>189</sup> *See* Nykiel, *supra* note 93 (detailing the ways Olympians earn money, none of which are directly tied to revenue).

<sup>190</sup> *See id.* (explaining that Olympians can only receive stipends or bonuses for their performance, which are not directly tied to revenue).

<sup>191</sup> *Compare* S.B. 6722B, 2019–2020 Leg., Reg. Sess. § 6438-a(8) (N.Y. 2019) (requiring the payment of a percentage of ticket sale revenues to all student-athletes at the end of each year), *with* Mike Jones, *Kirk Cousins Officially Signs*

Olympic amateurism model and towards privatized professionalized developmental sports.

The New York bill puts the universities in the position of *de facto* employer.<sup>192</sup> Indeed, the only difference between the New York bill and the professional model is that players are paid a guaranteed portion of revenues rather than a pre-determined salary.<sup>193</sup> Such a payment structure is unheard of in professional sports, where the highest valued contracts are guaranteed only for salary.<sup>194</sup> Incredibly, the direct payment of revenues under the New York bill suggests that student-athletes could earn a commission off their school's athletic programs. No matter the interpretation of such a payment structure, an employee relationship clearly departs from *Dawson and Berger*, implicating a shift to privatization.<sup>195</sup>

It should be noted that some scholars have advocated for a completely privatized NCAA model<sup>196</sup>—allowing full compensation for players in line with professional sports. However, such a solution is definitively a far departure from the NCAA's desire to keep college sports in line with the current amateurism model.<sup>197</sup> Princeton University's Professor Andrew Zimbalist proposed an example of a completely privatized college sports model:

The University of Michigan Wolverines could still be the Michigan Wolverines and play their games in Ann Arbor, but the football players would have no necessary connection to the university. Rather, the

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*Three-Year, \$84 Million Deal with Minnesota Vikings*, USA TODAY (Mar. 15, 2018, 3:23 PM), <https://www.usatoday.com/story/sports/nfl/vikings/2018/03/15/kirk-cousins-officially-signs-minnesota-vikings/419918002/> (explaining that professional football player Kirk Cousins recently signed a contract guaranteeing his \$84 million salary).

<sup>192</sup> See N.Y. S.B. 6722B § 6438-a(8) (guaranteeing players a portion of ticket revenues).

<sup>193</sup> *Id.*

<sup>194</sup> Jones, *supra* note 191 (explaining that Kirk Cousins signed the first *fully* guaranteed deal at top of the market value).

<sup>195</sup> See *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 294 (7th Cir. 2016); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905, 912 (9th Cir. 2019).

<sup>196</sup> ZIMBALIST, *supra* note 23, at 200.

<sup>197</sup> Gleeson, *supra* note 84.

team, with subsidies from the pros, would be a separate business entity. It would rent the stadium or arena from the university and some of its players might be part-time students. But all its players would be paid as minor league football or basketball players. The Michigan students could still root for their local team, the way they might root for the Detroit Lions or Pistons. Only now the team would be playing on their campus and the connection would be closer. Michigan boosters should be just as happy either way. If the schools that run perennially profitable football or basketball teams resist such a change, then they might be offered the option of owning the team as a separate entity. In any event, the school can earn money by renting and operating the stadium, retaining student athletic fees, or providing room and board for the players.<sup>198</sup>

The current NCAA model sets up students for greater financial success than privatized development leagues. Advocates of privatization might contend paying their players a salary would help fairly allocate revenue, but such salaries are meager compared to the value of an athletic scholarship. The MLB has endured intense scrutiny of their underpayment of developmental players, recently “raising” their minimum payment of players to merely meet the minimum wage.<sup>199</sup> Meanwhile, the NBA’s developmental “G-League” recently upgraded its player contracts to \$35,000 per year.<sup>200</sup> The most lucrative minor league salaries, found in AHL hockey, begin at \$47,500 per year.<sup>201</sup> In contrast, NCAA teams offer competitive athletic scholarships—including room and board. At Dayton University, for any student-athlete, such a scholarship can

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<sup>198</sup> ZIMBALIST, *supra* note 23, at 199–200.

<sup>199</sup> Michael Baumann, *The Disgrace of Minor League Baseball*, THE RINGER (Apr. 20, 2018, 5:50 AM), <https://www.theringer.com/mlb/2018/4/20/17259846/minor-league-baseball-anti-labor-ronald-acuna-scott-kingery> (explaining that minor league baseball players were projected to earn \$1,160 per month, on workweeks spanning between 50-70 hours).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

be worth close to \$55,000 per year for tuition and housing.<sup>202</sup> These scholarships also provide the intangible opportunity for advancement outside of athletics, as NCAA student-athletes boast a rising 87% graduation rate.<sup>203</sup> In contrast, private development league players barely make minimum-wage and work extremely long hours, all with little guarantee they will make it to the pros.<sup>204</sup>

Privatized development leagues may also interfere with young players' ability to achieve scholarly enrichment. For example, some blame the bifurcated private/collegiate developmental system in professional baseball for the fact that NCAA baseball scholarships are "almost unheard of," demonstrating how major professional development systems may hinder athletes' ability to play while earning a college degree.<sup>205</sup> Thus, the NCAA's model, compared to a privatized model, appears to ensure young athletes are not subjected to gross underpayment and still receive the intrinsic benefits of a college degree.

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<sup>202</sup> *Tuition and Costs for Undergraduates*, UNIV. OF DAYTON, <https://udayton.edu/affordability/undergraduate/tuition-approach/tuition-cost.php> (last visited Oct. 15, 2020).

<sup>203</sup> Associated Press, *College Athletes Continue to Earn Degrees at Record Rates*, USA TODAY (Nov. 8, 2017, 3:53 PM), <https://www.usatoday.com/story/sports/college/2017/11/08/college-athletes-continue-earn-degrees-record-rates/845611001/>.

<sup>204</sup> Travis Sawchik, *Do We Even Need Minor League Baseball?*, FIVE THIRTY EIGHT (Sept. 9, 2019, 6:00 AM), <https://fivethirtyeight.com/features/do-we-even-need-minor-league-baseball/> ("A Baseball America study of the 1981–2010 drafts found that only 17.6 percent of drafted and signed players reached the majors, and only 9.8 percent produced 0.1 career wins above replacement, a minimal level of production."). Further, an ex-Houston Astros official explained their decision to consolidate their minor league teams because "[they] were trying to support a bunch of players that had a less than one percent chance of making the major leagues." *Id.*

<sup>205</sup> See Baumann, *supra* note 199 (detailing how minor league baseball has disincentivized players to take college scholarships by offering a more expedient route to the MLB).

*B. California's Fair Pay to Play Act Faces Potential Violations of the First Amendment and Anti-Trust Implications*

California's Fair Pay to Play Act is the first enacted legislation to prevent universities and the NCAA from denying college athletes the ability to profit from their name and likeness.<sup>206</sup> As California Governor Gavin Newsom signed California's Fair Pay to Play Act<sup>207</sup> on LeBron James's HBO talk show, he opined the bill would "initiate dozens of other states to introduce similar legislation . . . [to] change college sports for the better by having now the interests of the athletes finally on par with the interests of the institutions . . . [thus] rebalancing that power arrangement."<sup>208</sup> Upon closer examination, the Act seems to have instead slyly rebalanced student-athletes newfound bargaining freedoms in favor of the universities.<sup>209</sup> For example, under the Act, student-athletes may not make deals which conflict with their university's endorsement deals:

(e) (1) A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract.

(2) A student athlete who enters into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness shall disclose the contract to an official of the institution, to be designated by the institution.

(3) An institution asserting a conflict described in paragraph (1) shall disclose to the athlete or the athlete's legal representation the relevant contractual provisions that are in conflict.<sup>210</sup>

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<sup>206</sup> Murphy, *supra* note 32.

<sup>207</sup> S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

<sup>208</sup> *The Shop Uninterrupted Season 2, Episode 4*, at 4:15 (HBO 2019).

<sup>209</sup> See Cal. S.B. 206 §§ 67456(e)(1)–(3) (limiting student-athletes' ability to seek endorsements if they conflict with their university's endorsements).

<sup>210</sup> *Id.*

The restriction on a player's ability to seek endorsement deals which suit their individual brand compounds years of free speech violations that,<sup>211</sup> prior to the suggestion of the Act, scholars already took issue with—namely, universities' practice of forcing college students to conform to their respective endorsement deals:

The value of free speech is the sine qua non of academic life. It should never be compromised. The NCAA needs an Association-wide, clear policy that prohibits commercial contracts with sneaker or other companies that include any form of no-taping or no-criticism clauses. Further, if athletes wish to protest labor or other policies of the sneaker companies in Asia, they should not be required to wear their products. Coaches who penalize such players should be sanctioned. University contracts with sneaker or other companies should only stipulate that athletes will be encouraged to use certain products.<sup>212</sup>

New York's proposal mirrors this problematic California Act provision, and national uniformity could instigate a nationwide free-speech problem.<sup>213</sup> Illinois and Pennsylvania have already proposed bills which directly mirror the California Act's language,<sup>214</sup> and the NCAA has suggested that if it is going to change the way college

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<sup>211</sup> See ZIMBALIST, *supra* note 23, at 204 (demonstrating that even twenty years ago, Zimbalist believed collegiate athletic programs violated student-athletes' free speech rights by demanding exclusive contracts with restrictive no-taping and no-criticism clauses).

<sup>212</sup> *Id.*

<sup>213</sup> See S.B. 6722B, 2019–2020 Leg., Reg. Sess. § 6438-a(5)(A) (N.Y. 2019) (restraining the ability of an athlete to seek endorsement deals that conflict with pre-existing university deals); see also Cal. S.B. 206 § 67456(e)(1), (denying students' stability to receive endorsements that conflict with pre-existing university deals).

<sup>214</sup> Alexia Fernandez Campbell, *Free Labor from College Athletes May Soon Come to an End*, VOX (Oct. 3. 2019, 5:40 PM), <https://www.vox.com/identities/2019/10/3/20896738/california-fair-pay-to-play-act-college-athletes> (explaining that lawmakers in Illinois and Pennsylvania are in the process of introducing bills which “mirror” California's, while Congressional representatives have opined that they want to introduce similar legislation “within the next year”).

athletes are compensated, it wants uniformity among the laws.<sup>215</sup> The current NCAA proposal not only mirrors this language, but expands its limitations, denying athletes the ability to seek endorsement deals from “an athletics equipment company or manufacturer to publicize [that] the institution’s athletics program uses its equipment.”<sup>216</sup> Under this proposal, not only can players not sign endorsements with competing athletics equipment companies, but they also cannot sign with those that endorse their universities.<sup>217</sup> Therefore, if the California Act continues to be the uniform model for compensating players, the free speech issue could become a countrywide setback.

The California model also implicates the very same anti-trust issues warned of in *O’Bannon*.<sup>218</sup> Its statute mandates student athlete endorsements may not conflict with their university’s endorsements.<sup>219</sup> This is highly problematic because the most lucrative sports deals are typically offered by athletic clothing

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<sup>215</sup> Dan Murphy, *NCAA to Meet Tuesday to Consider Allowing Athletes to Profit from Endorsements*, ESPN (Oct. 28, 2019), [https://www.espn.com/college-sports/story/\\_/id/27952245/ncaa-meet-tuesday-consider-allowing-athletes-profit-endorsements](https://www.espn.com/college-sports/story/_/id/27952245/ncaa-meet-tuesday-consider-allowing-athletes-profit-endorsements) (responding to the idea of the NCAA having to comply with a variety of different laws all aimed at allowing the compensation of student-athletes, President Mark Emmert simply said, “[i]t can’t be done”).

<sup>216</sup> Steve Berkowitz, *NCAA Unveils Proposed Rule Changes Related to Athletes’ Name, Image and Likeness*, USA TODAY (Nov. 13, 2020), <https://www.usatoday.com/story/sports/college/2020/11/13/ncaa-nil-name-image-likeness-proposal/6281507002/>.

<sup>217</sup> *Id.*

<sup>218</sup> See S.B. 206, 2019–2020 Leg., Reg. Sess. § 67456(e)(1)–(3) (Cal. 2019) (resolving conflicts in endorsement deals between a school and the athlete in favor of the school, creating a trade restraint which limits the athletes options when seeking potential endorsements); see also *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1057 (9th Cir. 2015) (holding that the NCAA violated anti-trust laws by limiting the players’ ability to profit from their names, images and likenesses, while the NCAA profited off licensing the same). See also Berkowitz, *supra* note 216 (noting that the current NCAA proposal both resolves endorsement conflicts in favor of the university and prevents athletes from signing athletic equipment endorsement deals with companies that already sponsor their university).

<sup>219</sup> Cal. S.B. 206 § 67456(e)(1).

brands,<sup>220</sup> and such arrangements are very likely to conflict with their university's team-outfitting deals.<sup>221</sup> Even in professional sports, where entire leagues are outfitted by a single brand,<sup>222</sup> players are often subject to severe penalties for wearing their sponsors' apparel without the express permission of the league.<sup>223</sup> Otherwise, professional players are afforded wide latitude to engage in endorsement deals.<sup>224</sup> Accordingly, the ban on conflicting endorsement deals reeks of the anti-trust complications that the *O'Bannon* court sought to alleviate.<sup>225</sup>

Like the trade inhibiting practices of the NCAA at issue in *O'Bannon*, the California Act has the inadvertent effect of giving universities the exclusive ability to dictate which types of athleticwear deals student-athletes may sign.<sup>226</sup> The NCAA's strict amateurism model, criticized by the *O'Bannon* court for preventing students from sharing in the NCAA's ill-derived videogame

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<sup>220</sup> See *Ranking the Top 10 Athletes by Endorsement Income for 2018*, SPORTS ILLUSTRATED (Sept. 19, 2018), <https://www.si.com/sports-illustrated/2018/09/19/ranking-top-10-athletes-endorsement-deals-income> (explaining that LeBron James and Cristiano Ronaldo have lifetime agreements with Nike worth \$1 billion, and Roger Federer has a 10-year, \$300 million agreement with Uniqlo—all the largest endorsement deals each athlete respectively has agreed to).

<sup>221</sup> See Kish, *supra* note 20 (explaining that at least one college football coach receives up to seven figure benefits for allowing Nike the right to exclusively outfit their team, while many more coaches likely have similar deals).

<sup>222</sup> Ahiza Garcia, *NFL and Nike Sign 8-Year Contract for Uniforms*, CNN BUS. (Mar. 27, 2018, 5:30 PM), <https://money.cnn.com/2018/03/27/news/companies/nike-nfl-gear-contract/index.html> (reporting that Nike extended its right to outfit NFL teams through 2028 for an undisclosed amount after having recently secured similar rights in the NBA for eight years for \$1 billion).

<sup>223</sup> Darren Rovell, *Urlacher Gets Fined \$100,000 for Super Bowl Stunt*, CNBC, <https://www.cnbc.com/id/18179918> (last updated Aug. 5, 2010, 4:33 PM).

<sup>224</sup> See *id.* (explaining that professional athletes can seek endorsement deals, even when they conflict with their league or team, with certain limitations imposed by their respective leagues).

<sup>225</sup> See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1057 (9th Cir. 2015) (holding that improper exploitation of players' likeness was anti-competitive).

<sup>226</sup> See *infra* note 228 and accompanying text.

profits,<sup>227</sup> is thus extended through the California Act. One interference with the right to contract is traded for another. Students will inevitably be forced into signing less lucrative endorsements because of inevitable university conflicts.<sup>228</sup> Indeed, the California Act paves the way for athletic companies to pay universities more for an outfitting endorsement, in consideration of the fact that student-athletes of that university would also be required to sign endorsements with that same athletic company to avoid a conflict.<sup>229</sup> Therefore, as it stands, California's Fair Pay to Play Act implicates substantially similar anti-trust issues as those discussed in *O'Bannon*.<sup>230</sup>

#### VI. A PROPOSED SOLUTION: ADOPTION OF THE OLYMPIC AMATEURISM MODEL

The constitutional and anti-competitive issues revolving around student-athlete compensation described herein could be ameliorated by the NCAA's adoption of the Olympic amateurism model.<sup>231</sup> Indeed, other commentators, particularly in the aftermath of the *O'Bannon* ruling, have urged that the NCAA should adopt the Olympic model to remedy the anti-competitive effects of the amateurism model.<sup>232</sup> Now, in the context of widespread state legislation and NCAA-promised reform, students should settle for no less than reforming the NCAA in the image of the Olympic model.<sup>233</sup> Despite its steadfast defense of the current model and

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<sup>227</sup> *O'Bannon*, 802 F.3d at 1067.

<sup>228</sup> See S.B. 206, 2019–2020 Leg., Reg. Sess. § 67456(e)(1) (Cal. 2019) (noting in the legislative counsel's digest that “[t]he bill would prohibit a student athlete from entering into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract”).

<sup>229</sup> See *id.* (requiring that conflicting endorsements be resolved in favor of the university, thus limiting the student's options).

<sup>230</sup> *O'Bannon*, 802 F.3d at 1057, 1058.

<sup>231</sup> Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 766 (2015).

<sup>232</sup> *Id.*

<sup>233</sup> S.B. 6722B, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019); Almasy et al., *supra* note 37.

expected sluggish approach to reform,<sup>234</sup> NCAA president Mark Emmert has admitted that the Olympic amateurism model should receive “serious consideration.”<sup>235</sup>

Adopting Olympic amateurism would allow student-athletes to bolster their baseline scholarship benefits with endorsements and championship bonuses, without abandoning the NCAA’s fiscal success. Furthermore, Olympic amateurism avoids First Amendment violations and the reprisal of anti-trust issues inherent in certain legislation, such as California’s Fair Pay to Play Act, by allowing athletes to seek endorsements unencumbered by conflicts with existing university deals.

Unlike New York’s proposal<sup>236</sup> or a privatized model,<sup>237</sup> the Olympic model provides students the opportunity to maximize their compensation while avoiding an employment relationship. Like Olympic athletes’ performance-based stipends, student-athletes could maintain their livelihood through a performance-based scholarship from their university.<sup>238</sup> College athletic scholarships could also cover room and board—similar to Olympic Committee stipends intended to cover living expenses.<sup>239</sup> Further, under the Olympic model, student-athletes would continue to benefit from a college education, minimizing the risk of substituting their educational potential for underpaying private developmental leagues<sup>240</sup>—and thus avoiding the woes experienced by minor-league baseball players.<sup>241</sup>

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<sup>234</sup> Testimony of Defendants’ Witness, Mark Emmert at 1768, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) No. C-09-3329. (opining that developmental leagues are less successful than the NCAA due to amateurism).

<sup>235</sup> Tim Daniels, *Mark Emmert: Olympic Model Worth Considering, Schools Don’t Want to Pay Players*, BLEACHER REPORT (Mar. 3, 2018), <https://bleacherreport.com/articles/2762467-mark-emmert-olympic-model-worth-considering-ncaa-doesnt-want-to-pay-players>.

<sup>236</sup> N.Y. S.B. 6722B.

<sup>237</sup> ZIMBALIST, *supra* note 23, at 199–200.

<sup>238</sup> Kathleen Elkins, *Here’s How Much U.S. Olympic Medalists Get Paid*, CNBC (Feb. 17, 2018, 9:00 AM), <https://www.cnbc.com/2018/02/16/how-much-olympic-athletes-get-paid.html>.

<sup>239</sup> *Id.*

<sup>240</sup> Baumann, *supra* note 199.

<sup>241</sup> *Id.*

New avenues of student-athlete compensation under the Olympic model would also not go so far as to disrupt the status quo marketability of amateurism. The NCAA has stated its goal is to “create . . . a path to enhance opportunities for student-athletes while ensuring they compete against students and not professionals.”<sup>242</sup> Privatized models, like those that share traits with the New York bill, do not meet this standard, because paying student-athletes a pre-determined portion of ticket sales could heighten their relationship with their respective sports program to that of an employee. As the Seventh Circuit pointed out in *Dawson*, such an expansion forsakes the very core concept of amateurism in college sports by sidestepping the employee-employer questions, and instead advancing college sports into a privatization scheme.<sup>243</sup>

The Olympic model avoids this result by allowing for compensation beyond scholarships in only two ways: endorsement deals and allowing individual nations to choose to payout so-called “medal bonuses”<sup>244</sup>—neither of which would slip into a privatization scheme by implicating an employment relationship. Prior to *Berger*, the NCAA’s championship gift provision already allowed for a college to provide student-athletes an item, such as a ring, worth up to \$415.<sup>245</sup> Further, endorsement deals do not conflict with prior jurisprudence because student-athletes would engage in separate contracts—unrelated to the university—with endorsers.

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<sup>242</sup> Hobson, *supra* note 83.

<sup>243</sup> See *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 288 (7th Cir. 2016).

<sup>244</sup> Elkins, *supra* note 238.

<sup>245</sup> Lindsay Schnell, *You Won a College Football Playoff Championship Ring—So Who Gets the Bling?*, USA TODAY (Jan. 7, 2018, 6:51 PM), <https://www.usatoday.com/story/sports/ncaaf/2018/01/07/college-football-playoff-championship-rings/1011695001/>. Although the bonus for an Olympic championship is sizably greater—\$37,500 for a gold medal compared to a \$415 ring—Olympic team championship bonuses are split amongst the team. Applying this to an NCAA basketball team of fifteen players, each player would get an approximate \$2,333 championship bonus, which is a significant raise. Elkins, *supra* note 238. Under the Olympic standard, universities, like individual nations, could retain wide latitude to determine the amount of the optional championship bonus. Kathleen Elkins, *Here’s How Much Olympic Athletes Earn in 12 Different Countries*, CNBC (Feb. 25, 2018, 9:00 AM), <https://www.cnbc.com/2018/02/23/heres-how-much-olympic-athletes-earn-in-12-different-countries.html>.

Adopting the Olympic amateurism model would allow student-athletes to financially benefit from endorsements without restrictive oversight. For example, Team USA Olympic athletes, like professional athletes, have the freedom to independently market their name, image and likeness, as long as they are in compliance with Rule 40 of the Olympic Charter, which states:

Competitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board.<sup>246</sup>

During the Olympics, the purpose of the Rule 40 limitation is to eliminate any potential public confusion among the endorsements of the national teams, the respective Olympians, and the Olympic Games itself. To initially comply with Rule 40, an athlete must register their personal sponsors and consent to the rule's guidelines.<sup>247</sup> Then, during the Rule 40 "blackout period"—a monthlong period beginning immediately before and continuing throughout the given year's Olympic competitions<sup>248</sup>—public sponsorship of an Olympian is banned unless that entity also sponsored the Olympic Games.<sup>249</sup> Recently, the International Olympic Committee relaxed Rule 40 limitations so that now, during the "blackout period," personal sponsors may generically market<sup>250</sup>

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<sup>246</sup> Olympic Charter ch. 5, Rule 40 (2020); *see also* Associated Press, *U.S. Relaxes Sponsorship Rules for Olympic Athletes*, USA TODAY (Oct. 8, 2019, 9:22 PM), <https://www.usatoday.com/story/sports/olympics/2019/10/08/us-relaxes-sponsorship-rules-for-olympic-athletes/40286135/>.

<sup>247</sup> David O. Klein, *Olympic Advertising Rules Scaled Back Prior to 2020 Games*, LEXOLOGY (Oct. 28, 2019), <https://www.lexology.com/library/detail.aspx?g=7e6e025d-c232-4496-acc-76f516a58602>.

<sup>248</sup> Chris Chavez, *What Is Rule 40? The IOC's Rule on Non-Olympic Sponsors, Explained*, SPORTS ILLUSTRATED (July 25, 2018), <https://www.si.com/olympics/2016/07/25/rule-40-explained-2016-olympic-sponsorship-blackout-controversy> (explaining that the blackout period ran from July 27, 2016 through August 24, 2016).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* (explaining in this context that "generic" or "non-Olympic advertising" is advertising or marketing which does not reference the Olympics at all).

their product in support of an individual Olympian so long as the Olympian does not redistribute those marketing materials.<sup>251</sup> Instead of redistribution, during the blackout period, Olympians may post up to seven thank you messages to personal sponsors, so long as they do not include any reference to the Olympic Games or Team USA.<sup>252</sup> Otherwise, during any other time of the year, Olympians have unlimited freedom to promote themselves. If the NCAA adopted this same model, collegiate athletes could market themselves independently to personal sponsors<sup>253</sup> and enter endorsement contracts for their appearance in advertisements, social media posts, and events, while preserving the NCAA's core value of student versus student competition.<sup>254</sup>

The Olympic amateur endorsement model's lack of cumbersome restrictions would also alleviate the First Amendment issues posed by California's Fair Pay to Play Act, by allowing student-athletes more freedom to choose their personal sponsors.<sup>255</sup> Although student-athletes may be subject to restrictions similar to those in Rule 40, they could, along with their personal sponsors—depending on whether the athlete is in-season—still thank or recognize one another through social media posts and advertisements.<sup>256</sup> With certain limitations, the Olympic model does not require athletes to conform to their sponsorships;<sup>257</sup> rather it

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<sup>251</sup> U.S. OLYMPIC & PARALYMPIC COMM., *ATHLETE MARKETING FOR THE OLYMPIC AND PARALYMPIC GAMES TOKYO 2020 RULE 40 GUIDANCE FOR THE UNITED STATES* 4 (Oct. 7, 2019) (“[D]uring the Rule 40 period, athletes cannot retweet or repost generic marketing content promoting brands, products or services.”).

<sup>252</sup> *Id.* at 6–7 (explaining that thank you messages online may be directed at personal sponsors but cannot specifically reference the Olympics nor the product the sponsor makes).

<sup>253</sup> Personal sponsors are companies which are not official sponsors of the Olympics or the sponsored Olympian's respective national team. *See id.*

<sup>254</sup> *See* 2020–21 NCAA DIVISION I MANUAL 1 (Aug. 1, 2020) (noting that NCAA Constitution Article 1, Provision 1.2 sets the NCAA's purpose to “initiate, stimulate and improve intercollegiate athletics programs for student athletes”)

<sup>255</sup> U.S. OLYMPIC & PARALYMPIC COMM., *supra* note 251, at 2.

<sup>256</sup> *Id.*

<sup>257</sup> *Compare id.* (allowing Olympic athletes to support personal sponsors that “[do] not compete with official sponsors”), *with* S.B. 206, 2019–2020 Leg., Reg.

seeks to merely eliminate any potential intellectual property abuse or brand confusion that may occur between the personal sponsor and the team rather than just the athlete.<sup>258</sup>

Lastly, the Olympic amateur endorsement model would alleviate the anti-trust issues described in *O'Bannon*, which are the likely result of California's Fair Pay to Play Act. It would effectively prevent universities from leveraging sponsorship with its control over student-athlete endorsements, precluding those institutions from creating a monopoly over student-athlete endorsement contracts. Again, the Olympic amateurism model's lack of restrictive limitations is instructive. In contrast to Rule 40's simple online registration requirements,<sup>259</sup> California's Act requires an after-the-fact process where the student-athlete and school have to engage in a continuous, back-and-forth dialogue.<sup>260</sup> The Act mandates that student-athletes cannot sign endorsement contracts that conflict with a provision of their university's contract.<sup>261</sup> Under the Olympic model, except during the "blackout period," there are no limitations on an athlete's ability to secure sponsorships. Unlike the present system, which basically operates as a "cartel," adopting the Olympic model would empower student-athletes to demand more from colleges when deciding which to attend.<sup>262</sup>

## CONCLUSION

Despite its fabled beginnings, amateurism may be nearing its deathbed. Although the NCAA has identified important reasons for

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Sess. § 67456(e)(1) (Cal. 2019) (restricting a student-athlete's ability to promote brands that conflict with the team's contract).

<sup>258</sup> U.S. OLYMPIC & PARALYMPIC COMM., *supra* note 251, at 2, 4.

<sup>259</sup> *See id.* at 3 (explaining the instructions for Rule 40 registration).

<sup>260</sup> Cal. S.B. 206 § 67456(e)(2)–(3).

<sup>261</sup> *Id.*

<sup>262</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1058 (9th Cir. 2015); *see* U.S. OLYMPIC & PARALYMPIC COMM., *supra* note 251, at 2 (noting that the Olympic model allows Olympians to sign endorsement deals which, applied in the NCAA context, could allow students to choose schools which would maximize their ability to receive endorsements).

continuing to incorporate amateurism,<sup>263</sup> with the introduction of California's Pay to Play Act,<sup>264</sup> and the subsequent announcement by the NCAA to eventually allow student athletes to profit off their names and likenesses, a shift in the model seems necessary and imminent. The Olympic amateurism model has slowly allowed athletes more freedom to accept endorsements, in a manner which inspires hope for the future of NCAA athletics. If fully adopted by the NCAA, the Olympic model will finally allow student-athletes to simultaneously self-monetize and earn a college degree, all while developing their skills for professional sports.

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<sup>263</sup> Testimony of Defendants' Witness, Mark Emmert at 1759, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) No. C-09-3329.

<sup>264</sup> Cal. S.B. 206.